IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1238 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAYANTILAL C PUROHIT

Versus

VEDPRAKASH G GUPTA

Appearance:

MR PRANAV G DESAI for Petitioner

MR JIVANLAL G SHAH and Mr.H.J. Shah for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 19/01/2001

ORAL JUDGEMENT

1. Appellant-original defendant, by filing this appeal, has challenged judgment and decree dated July 9, 1979, passed by the learned Judge, Court No.12, City Civil Court, Ahmedabad, in Civil Suit No.2437 of 1974, whereby, the learned Judge has passed a preliminary decree in favour of the respondent-original plaintiff by holding that the appellant shall render the accounts to the respondent in respect of the amount received by him out of sale of the said plot of land and, after taking the accounts, the respondent be given half share as agreed between the parties.

2. According to the averments made in the plaint, the respondent and the appellant had decided to do a

business of purchase and sale of land and, accordingly, they had entered into a partnership for purchase and sale of a piece of land bearing Survey No.407 situated in the sim of village Vejalpur, Taluka Ahmedabad. It was agreed that they would divide the profit in equal share when the said land would be sold in the open market. It is also averred that the appellant and the respondent had kept their office in Chanothi Masjid Building, near Sankdi Street, Ahmedabad. The respondent and the appellant had jointly entered into agreement dated July 15, 1970 for purchase of a piece of land bearing Survey no.407 at the rate of Rs.5/- per sq.yard with owner, Chaturji Nathaji and his two sons Chhanaji and Ataji. It is the case of the respondent that, initially, the period for executing the sale deed was 11 months, but was extended from time to time till June 15, 1972. According to the respondent, the appellant was mainly handling the work of completing the transaction and was maintaining the accounts in respect of the said transaction. According to the respondent, some jottings of the accounts were made and both the parties had signed below those jottings. It is the case of the respondent that the appellant, by keeping the respondent in dark, had entered into the transaction in respect of the said piece of land and was making an attempt to sell right and title over the said land to other parties. As per the case of the respondent, the appellant had sold away the right and title over the said land to some other party by selling it at the rate of Rs.16/- per sq.yard. As the appellant was acting against the interest of the respondent, both the parties again met on September 12, 1971 and prepared another jottings of the accounts and calculated the accounts at the rate of Rs.16/- per sq.yard. The said said calculation was signed by the appellant and the respondent. However, the appellant had sold away the right of the respondent over the disputed land by entering into agreement with a third party on October 16, 1971 at the rate of Rs.16/- per sq.yard. It was averred that the appellant had received the entire amount calculated at that rate, but did not give the half share of the respondent from the profit which was earned by selling the land. The respondent had repeatedly requested the appellant to render the accounts and to pay his half share from the profits earned from the sale of the said plot of land. Ultimately, the respondent had to file the suit for dissolution of the partnership business and for accounts of the partnership venture.

3. The suit was resisted by the appellant by filing written statement at Exh.16. It was admitted by the appellant that he and the respondent had entered into the

agreement for purchase of the said piece of land from its owners on July 15, 1970, but, it was denied that it was a joint venture between him and the respondent and it was also denied that they would divide the profit in equal share after sale of the said land to other party. It was averred that it was agreed between them that the respondent would invest money for purchase of the said land within stipulated time, but, as the respondent had no sufficient fund and he just wanted to purchase the said piece of land, it was not possible to execute the sale deed with the original owners and, therefore, the appellant and the respondent had forfeited their rights in the agreement of sale and, therefore, the agreement of sale did not remain in force. It was averred that the joint venture had come to an end when the sale deed was not executed. It was denied that the respondent had invested Rs.9500/- towards payment of earnest money and towards part payment of sale price. With regard to the jottings, which were made after settling the accounts, it was denied by the appellant that the said jottings were made and the accounts were settled as contended by the respondent in his plaint. The appellant further averred that the respondent had initiated criminal proceeding against him in the criminal court at Ahmedabad, but he was not successful and his complaint came to be dismissed. The appellant further contended that the suit was not maintainable on the ground of non-joinder and misjoinder of necessary parties and it was barred by limitation, laches and estoppel.

4. On the basis of abovereferred to rival pleadings of the parties, the learned trial judge framed issues at Exh.31. The respondent was examined at Exh.32. One Madhukar Kachharabhai Pilwaikar before whom the jottings of settlement of accounts were made, was examined at Exh.43. The appellant examined himself at Exh.44. No witness in his support was examined by the appellant.

5. The learned trial judge, after appreciating the oral as well as documentary evidence, and the arguments advanced by the learned advocates for the parties, concluded that: (1) It was proved that the appellant and the respondent had entered into a partnership for purchase and sale of a piece of land bearing Survey No.407 situated in the sim of village Vejalpur, Taluka Ahmedabad. (2) It was proved that, in the aforesaid joint venture, it was agreed by the parties to divide the profit in equal share on the sale of the said piece of land. (3) It was proved that the appellant and the respondent had jointly entered into agreement on July 15, 1970 for purchase of the said piece of land at the rate

of Rs.5/- per sq.yard with the original owners. (4) It was proved that the period of 11 months mentioned in the said agreement was extended from time to time till June 15, 1972. (5) It was proved by the respondent that the appellant had sold away their rights, title and interest in the suit land on October 16, 1971 at the rate of Rs.16/- per sq.yard and had received the entire amount and had not given equal share to the respondent and, therefore, the appellant was liable to render accounts for the same. (6) The appellant had failed to prove that the owners of the said piece of land had forfeited the rights of the appellant and the respondent for sale on August 20, 1971, and, thereafter, the said agreement for sale had not remained in force and the joint venture had come to an end. (7) The appellant had failed to prove that he had entered into the sale transaction with the original owners of the said piece of land in his individual capacity. (8) The suit was maintainable and is not bad for non-joinder and misjoinder of parties. (9) The suit was not barred by the law of limitation. On the basis of the aforesaid conclusion, the learned trial judge decreed the respondent's suit by holding that the joint venture was entered into between the respondent and the appellant for purchase and sale of a piece of land bearing Survey No.407 and the said joint venture/partnership was dissolved with effect from the date of the institution of the suit and it was held that both the parties to the suit are entitled to equal share in profits on the sale of the said plot of land. The learned trial judge passed a preliminary decree by holding that the appellant shall render the accounts to the respondent in respect of the amount received by him out of sale of the said plot of land and, after taking the accounts, the respondent be given the half share as agreed between the parties. After passing the preliminary decree, the trial judge referred the matter to the Commissioner for taking accounts, City Civil Court, which has been challenged by the appellant by filing this appeal.

6. Learned counsel Mr. P.G. Desai for the appellant and learned counsel Mr. H.J. Shah for the respondent have taken me through the entire record and proceedings of this appeal. The learned counsel for the appellant has vehemently submitted that the agreement to sell Exh.24 cannot be considered as partnership deed under the provisions of the Indian Partnership Act, 1932 ('Act' for short). It was contended that the suit of the respondent was not maintainable as the original owner, Chaturji Nathaji Thakor and his sons were not made parties in the suit. The learned counsel for the

appellant next submitted that the respondent was not ready and willing to perform his part of the contract as he had not made available sufficient amount for executing sale deed and, therefore, he had forfeited his right over the said land and, therefore, the appellant was not liable to render any account. The learned counsel for the appellant further submitted that the suit was clearly barred by the provision of Section 69(2) of the Act as the partnership was not registered. The learned counsel for the appellant further submitted that the original owner, Chaturji Nathaji, by sending notice dated September 20, 1971 (Exh.42) had cancelled the agreement of sale and, therefore, the joint venture had come to an end after the said notice of cancellation of agreement to sell was given by the original owner, Chaturji Nathaji. It is, therefore, submitted by the learned advocate for the appellant that the appeal may be allowed and the impugned judgment and decree may be quashed and set aside.

7. The learned counsel for the respondent submitted that the suit filed by the respondent was for dissolution of the partnership and for accounts and, therefore, no notice under Section 43 of the Act was required to be served. The learned counsel for the respondent submitted that the agreement to sell was extended from time to time by the original owner, Chaturji Nathaji, upto June 15, 1972 by paying the amounts as mentioned in Exh.24, i.e. agreement to sell executed on July 15, 1970. The learned counsel for the respondent, therefore, submitted that Chaturji Nathaji had no right to cancel the agreement of sale in view of the fact that the time to complete the sale was extended from time to time by accepting part payment of consideration amount on various dates and lastly it was extended upto June 15, 1972. The learned counsel for the respondent submitted that the jottings, which were prepared and produced at Exh.37, also indicated that the amount which was paid to the original owner, Chaturji Nathaji, was invested by the respondent alone and, therefore, as per the jottings produced at Ex.37, the appellant was liable to pay the half profit as stated in the jottings Exh.37 and Exh.38. The learned counsel for the respondent submitted that the said jottings were verified by Madhukar Kachharabhai Pilwaikar Exh.43 and, therefore, no doubt can be raised with regard to the said jottings which were produced at Exh.37 and Exh.38. The learned counsel for the respondent submitted that the suit was for accounts and dissolution of the partnership firm and, therefore, the provision of Section 69(2) of the Act will not be applicable and the suit was

maintainable under the provision of Section 69(3) of the Act and, therefore, the appeal may be dismissed.

8. The submission of the learned counsel for the appellants that the agreement to sell Exh.24 cannot be considered as partnership deed under the Act does not deserve any merit and it is hereby rejected. In the agreement to sell Exh.24, it was specifically mentioned that the intending purchasers, namely, the appellant and the respondent, had entered into the agreement to sell and their respective share was 50% each. This indicates that there was a partnership entered into between the appellant and the respondent with regard to the land in question and the profit was to be shared 50% by each of them. The jottings produced at Exh.37 and Exh.38 which bear the signatures of the appellant as well as the respondent also indicate that there was a partnership and, by settlement of accounts in the month of July 1971, the parties had agreed that the amount was required to be paid by the appellant to the respondent. The settlement of account was arrived at due to the intervention of Mr. Madhukar Pilwaikar Exh.42. Mr. Pilwaikar in his evidence has stated that these jottings were prepared by settling the accounts in his office and the jottings were prepared in duplicate and each party was given a copy of the same. The agreement to sell Exh.24 and the jottings Exh.37 and Exh.38 arrived at between the parties with regard to settlement of their accounts of partnership, in my view, indicate that there was a partnership between the appellant and the respondent with regard to transaction of the land in question. A partnership is not necessarily created by an agreement in writing. It can be by oral agreement also or an agreement can be inferred from the conduct of the parties. Therefore, apart from a written agreement, the actual conduct or the intention of the parties is important in deciding questions of partnership. In my opinion, by entering into agreement of sale by the appellant and the respondent with Chaturji Nathaji Thakor and others, a partnership was created between the two. The business of partnership was to share the profit to be earned out of purchase and sale of the disputed land. The subsequent conduct of the parties in arriving at the settlement of accounts by writing the jottings Exh.37 and Exh.38 also makes it abundantly clear that the partnership was created between the appellant and the respondent and the appellant had agreed to pay the amount as stated in the jottings to the respondent.

9. The submission of the learned counsel for the appellant that, as the original owner Chaturji Nathaji

and his sons were not made parties in the suit, the suit was not maintainable for non-joinder of necessary parties, deserves to be rejected. The suit filed by the respondent was essentially a suit for dissolution and taking accounts of partnership firm. Chaturji Nathaji cannot be called a necessary party to resolve the disputes involved in the suit. There was a partnership agreement between the appellant and the respondent wherein Chaturji Nathaji was not a party. The trial court has rightly rejected the contention raised that the suit was bad for non-joinder of necessary parties.

10. The learned counsel for the appellant has, next, contended that the respondent was not ready and wiling to perform his part of contract as he had not made available sufficient amount for executing the sale deed and, therefore, he had forfeited his right over the said land and, therefore, the appellant was not liable to tender any account. This submission also does not deserve any merit and is rejected. The evidence of the respondent Exh.32 indicated that the amount of Rs.4000 as earnest money and Rs.5500 towards part-payment was paid by him. He had also deposed that further amount of Rs.1600/was paid by him on October 25, 1970 and the period of agreement was extended upto December 15,1971 and endorsement was duly made by two sons and Chaturji Nathaji. The evidence of the respondent further indicated that he had paid Rs.100 while the appellant had paid Rs.1500 on April 29, 1971 and, thereafter, the period of agreement of sale was further extended upto June 15, 1972 and the vendors had duly put their signatures and thumb impression on the agreement. After the period of agreement to sell was extended, the appellant got executed the agreement to sale in favour of one Magilal by selling the land in question at the rate of Rs.15 per sq.yard. The respondent had thereafter served a notice on the said Magilal not to purchase the land in dispute as the agreement to sell the said land was already alive. By this conduct of the respondent, it becomes evidence that he had never waived his right to purchase the land in dispute and he was always ready and willing to purchase the land along with the appellant at the agreed price. On the contrary, the appellant in collusion with the original vendor and with the help of his wife had got the agreement to sell entered into between the original vendors and Rukmani Vallabh Cooperative Housing Society, of which the wife of the appellant was a promoter, in whose name, the permission for sale of the said piece of land under Section 63(G) of the Bombay Tenancy and Agricultural Lands Act was obtained. This indicates that the respondent was

deprived of his right to share the profit out of sale of the land in dispute. By no stretch of imagination, it can be said that the respondent had waived his right to get documents executed and had not shown his readiness and willingness to pay the money to the original vendor. On the contrary, the respondent had paid the whole amount of the earnest money to the original vendor, and, accordingly, in the jottings also, the said amount was shown as outstanding dues of the partnership business to be recovered by the respondent as partner of the partnership. In my opinion, the respondent had never waived his right, nor he had abandoned or shown unwillingness to execute the sale deed and, therefore, he was entitled to claim the amount of his share of the partnership business. On the contrary, the respondent was duped by the appellant by getting the sale deed executed in the name of Rukmani Vallabh Cooperative Housing Society Limited, the promoter of which was none other, but the wife of the appellant.

11. The submission of the learned counsel for the appellant that, as partnership between the appellant No. and the respondent was not registered, the suit filed by the respondent for dissolution of the firm and for accounts was barred by the provision of Section 69(2) of the Act. In my opinion, the submission of the learned counsel for the appellant does not deserve any consideration. Firstly, the objection of non-registration of partnership was not raised by the appellant in his written statement. Plea regarding the non-registration of the partnership under the Act should be raised at the earliest stage. It is not proper to allow the appellant, at a late stage, to raise such a plea in the absence of any pleading by him in that respect, the reason being that if such a plea is taken at the earliest opportunity, the plaintiff may withdraw the suit and file a fresh suit after getting registration and avoid all questions of limitation. Secondly, the non-registration of a partnership firm will not affect the respondent's suit for dissolution of firm and for account. Sub-section (3) of Section 69 of the Act, however, provides that a right to sue for dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm can be enforced even if there is no compliance of the provisions of sub-section (1) or sub-section (2) of Section 69. Therefore, in my view, the suit for dissolution of an unregistered partnership firm and for accounts by one of its partners is not barred and it is maintainable under Section 69(3)(a) of the Indian Partnership Act, 1932. The Legislature intended that no

disability should attach to any partner in regard to winding up of the affairs of the firm including realisation of the property of the dissolved firm and its accounting between the partners of its dissolution. A partner can enforce any right to sue for dissolution of firm or for accounts of dissolved firm or for realising property of the dissolved firm. In other words, a suit for accounts for the dissolved firm or for realising assets of the dissolved firm is not barred under the provisions of sub-sections (1) and (2) by raising objection contained in sub-section (3) of Section 69. Therefore, in my opinion, the suit for dissolution of partnership and for accounts of unregistered partnership firm is well protected by Section 69(3)(a) of the Indian Partnership Act, 1932 and the exception, i.e. Section 69(3)(a) excludes such a suit from the operation of general rule as laid down in Section 69(2) of the Act.

12. The learned counsel for the appellant had also submitted that the original owner, Chaturji Nathaji, by notice dated September 20, 1971 (Exh.42), had cancelled the agreement to sell and, therefore, the joint venture had come to an end, and, after the said notice of cancellation of agreement to sell was given by the original owner, and as a result thereof the said partnership business had come to an end, the respondent could not have filed the suit for accounts. In my opinion, the submission of the learned counsel for the appellant deserves to be rejected. The agreement to sale had never come to an end when notice dated September 20, 1971 (Exh.42) was sent by the original owner, Chaturji Nathaji. The document Ex.24, which is agreement to sell, indicates that the original owner and his sons by accepting the amount of Rs.1600 on April 27, 1971 had extended the period for executing the document till December 15, 1971. The endorsement below document Exh.24 bears the thumb impression of Chaturji and the signatures of his two sons. The period of executing the document was further extended till June 15, 1972 by the original owner and his two sons and an endorsement was also made below the agreement to sell Exh.24. These endorsements, as stated above, made below the agreement to sell Exh.24 make it abundantly clear that the period of executing the document was extended from time to time and it finally stood extended till June 15, 1972. Therefore, in my view, Chaturji Nathaji could not have sent notice Exh.42 cancelling the agreement to sell.

13. The jottings Exh.37 and Exh.38 which came to be made by both the parties, namely, the appellant and the respondent, after settling the accounts due to

intervention of Pilwaikar, Exh.43, in my opinion, the amount so stated in the said jottings was due and payable to the respondent as his share of the dissolved partnership firm. Therefore, in my opinion, the learned trial judge has not committed any error in passing the preliminary decree in favour of the respondent.

14. For the foregoing reasons, the appeal is dismissed. The judgment and decree dated July 9, 1979, passed by the learned Judge, Court No.12, City Civil Court, Ahmedabad, in Civil Suit No.2437 of 1974, is hereby confirmed. There shall be no order as to costs.

January 19, 2001 (M.H. Kadri, J.)
(swamy)